

**Water Pollution Control Advisory Council Meeting
June 8, 2000 - 9:30 a.m. - 12:55 p.m.
Conference Room Dept of Fish Wildlife & Parks**

Attendees

Council Members

Richard Parks, Fishing Outfitters Association of Montana
Lewis Keim, Trout Unlimited
George Algard, Dept of Agriculture
Doug Parker, ASARCO
Jack Stultz, DNRC
Roger Noble, Land & Water Consulting

Other Attendees

Bob Raisch, Dept of Environmental Quality (DEQ)
Theresa Blazicevich, DEQ
Ken McDonald, Dept of Fish Wildlife & Parks (DFWP)
Chris Levine, DEQ
Art Compton, DEQ
Abe Horpestad, DEQ
Claudia Massman, DEQ
Steve Welch, DEQ

Approval of Minutes

The Water Pollution Control Advisory Council (WPCAC) meeting was called to order by Chairman Richard Parks at 9:30 a.m. Chairman Parks introduced the subject of attendance and referenced the department's recommendations that were mailed to all members prior to the meeting. Bob Raisch explained that several members had called him earlier to say that they could not attend this meeting, and all had valid reasons. Mr. Raisch also discussed the limited input he received from other council members and possible solutions for increasing attendance. The council members felt that the current schedule of six yearly meetings is fine. Doug Parker suggested that Mr. Raisch and Chairman Parks have the option to cancel a meeting if there are no critical items on the agenda. Council members will be notified by email or telephone of meeting cancellations at least 15 days prior to the next scheduled meeting.

—In response, to a question from Mr. Parker, Mr. Raisch said that there is no requirement for a quorum because this is an advisory council. After some discussion, the Council decided that for members unable to attend meetings of critical importance, conference calls should be used when possible, or members should submit written comments. Chairman Parks said that members should be solicited to send in written comments when the council is carrying out its statutory obligations to critique regulatory proposals and members are unable to attend. Mr. Raisch said that he will include a request for written comments in the briefing packets sent out before meetings. Chairman Parks expressed his hope that the department values the council's judgement in matters other than just rule making.

Mr. Raisch stated that Mark Simonich, director of the department, wants the Council to advise the department on other issues as well.

Jack Stultz asked what criteria would be considered when canceling a meeting?

Chairman Parks thought that when there are no rule making proposals or time critical items, and only one or two items on the agenda, the meeting should be cancelled. He went on to say that any member of the council could submit agenda items, especially items concerning water quality in Montana.

The Council adopted the following recommendations: (a) retain the current every-other month meeting schedule; (b) discuss the agenda with the Chairman 25 days prior to the next meeting to decide whether to cancel the meeting; and, (c) notify council members by telephone, email, and mail of the cancellation at least 15 days prior to the meeting.

Roger Noble requested that the Council receive minutes of the Board of Environmental Review (BER) meetings in order to see what effect Council suggestions have in the BER decision process.

The minutes from the April 11th meeting were read and approved.

Proposed Rules and Circulars for Sewage Systems in Subdivisions. Theresa Blazicevich, DEQ

In the past there were three different circulars that addressed sewage systems in Montana. All three have been combined into one circular, DEQ 4, which contains standards for on-site, sub-surface sewage treatment

systems. Ms. Blazicevich explained that the rules have not changed, they have just been put into a new circular. Subchapter 9 contains minimum standards for issuing on site wastewater treatment permits or septic permits at the county level. Subchapter 9 applies to subdivisions that are greater than 20 acres; subdivisions less than 20 acres are covered by separate rules.

Ms. Blazicevich stated that newly developed engineering technologies allow on-site wastewater systems to be more efficient and allow for less stringent rules. The old rules were written in 1992 and do not address new technologies. A decision will be made this week regarding whether the department will go to the less stringent standards. The less stringent standards would only effect vertical separation distances, changing from a four foot vertical separation distance to a two foot distance above flood plains. This may allow development closer to streams and rivers. It will probably be the biggest issue in the new rules when the proposals go out for public comment.

Responding to Roger Noble's question, Ms. Blazicevich stated that Item 22 in the Circular addresses approving experimental wastewater systems. A waiver is still needed from the department. When an experimental system is proposed, the department looks at evidence from other states that have used it to see if it will work here. The National Sanitation Foundation also approves experimental systems after they test them. That process makes it easier for the state to approve a new system.

Mr. Noble asked questions regarding nondegradation, including whether all nondegradation analyses have a Level Two treatment option of 24 mg per liter and if the department will take another look at nondegradation rules. He stated that currently there is no consideration given regarding accumulation of pollutant levels in sewage water. He also wondered if the Legislative Auditor's recommendation for counties to take over the entire subdivision review process would overburden the counties.

Ms. Blazicevich said not all nondegradation analyses include the Level Two option, but those that do are included on a list in the nondegradation rules. The department will look again at nondegradation issues over the next year, especially regarding subdivisions. The nondegradation rules were not originally considered when writing the sewage rules because nondegradation falls under the Water Quality Act. She explained that the department will meet with counties on Tuesday, June 13, 2000 to talk about the Legislative Auditor's review of the Sanitation and Subdivision Act. The auditors looked at DEQ's entire process of reviewing subdivisions, including contributions to the process by the counties. The auditors then recommended that the state act as technical advisors and turn the whole review process over to the counties.

Mr. Parker was not convinced that this new filtering technology, especially thin filters without significant organic components, is going to take out nitrogen. Has that analysis been done for these systems?

Ms. Blazicevich replied that there is information that is Montana specific for the re-circulating sand filters, one of these systems, built by local engineers in Billings, is working very well. There is more information available on various types of sand filters from the midwest and other areas.

Mr. Parker asked if there was quantitative information available. All these systems have benefits over a regular system. Has an analysis been done for the trade off for reduction in separation depths to find out the impacts from nitrogen? Particularly in the shallow alluvial aquifers that we have problems with in Montana.

Ms. Blazicevich replied that the vertical separation from ground water or bedrock is an issue that most states struggle with. The department looked at the states around us, and the distances varied from zero to six feet in separation. A Level Two treatment does show a reduction in the level of nitrate, but it is hard to correlate it to the vertical separation distances.

Mr. Parker said that this is where the controversy is going to be over the three-to-four foot separation. What is the net impact of that change?

Ms. Blazicevich said that sand mounds and sand filters can show a reduction in nitrates, phosphorus and ecoli bacteria. It will allow development in places where there was no development before and it will have political impacts on future development.

Chairman Parks thought that it would be very helpful to the public if the BER would say if they are for or against this regulatory change. This proposal makes it easier to develop on the sides of valleys but we should be careful about cutting up agricultural land in the valley bottoms to make subdivisions just because it is easier to put in a septic system. The advantages to this proposal can produce other disadvantages.

Mr. Parker said it would be useful to separate the technical part from the land planning part and it will place an additional burden on the counties relative to land planning. Land planning is something the state has never concerned itself with and it should be. This group should be telling the state what we think about this.

Mr. Noble suggested that they could have an explanation for each of the different types of contaminants, how it functions for different processes and what will happen to the different types, for instance nitrates and phosphorus. He went on to say that the definition of bedrock is not very good, bedrock can be dug with anything and a better definition is needed. Mr. Parker agreed, and stated that the old definition was better.

Native Trout Recovery Program, Ken McDonald, Department of Fish Wildlife & Parks (DFWP)

The Grayling restoration plan began in 1995. It was the states first effort for trout recovery, and it has been a success. There was only one remaining population of river Grayling left in the lower 48 states and that was in the Big Hole River. One of the goals is to restore a stable population of Grayling in the Big Hole River and four other major river drainages by the end of this year, using brood stock from fish hatcheries. In 1998, the Ruby River had Grayling reintroduced and last year the Beaverhead and Sun rivers had Grayling reintroduced. The last reintroduction will be in the upper Missouri River around the Three Forks area by the end of this year. Montana's early action in 1996, and the progress made since then, has prevented the Grayling from being listed as endangered. Voluntary action by the Big Hole Watershed group has helped this effort.

The Bull Trout restoration program began in 1994, with the Governor appointing a restoration team to develop a plan to restore and protect Bull Trout in Montana. The U.S. Fish and Wildlife Service (USFWS) was forced to place the Bull Trout on the endangered species list for the entire Columbia River Basin which makes it harder for local control. The state picked 12 restoration or management areas, all of them west of the continental divide. Those were broken down into core areas, which are the best remaining habitat for spawning purposes. The state wants to protect existing populations and maintain genetic diversity within those core areas. Bull Trout are a migratory fish and considered an indicator species for spawning because they require clean cold water. This has required a tremendous amount of habitat restoration with the classic example being the Blackfoot River. Water quality and temperature are an issue, and the DFWP is working with DEQ to compare impaired water bodies with the Bull Trout restoration streams to make those streams high priority areas for the TMDL process. By combining efforts to improve water quality it will also improve the fishery in the area. There is a lot of opportunity to combine resources and programs to everybody's benefit and there is money available for this effort.

The West Slope Cutthroat plan began in 1996 with DFWP heading the program. One of the problems with this species is it will hybridize with Rainbow trout and reproduce. The pure fish that have not been hybridized will be the top priority to protect. A lot of headwater areas still have genetically pure fish. The majority of the fish are found on the west slope of the divide and they are in good shape. There are West Slope Cutthroat on the east side of the divide but generally they are not in good condition due to hybridization and water quality problems. Cherry Creek was one of the projects to get genetically pure fish into a fifty-mile continuous stretch of stream. The project is currently on appeal to the BER and a decision should be made in July of this year. The Cutthroat was petitioned for listing as an endangered species about three years ago, however the USFWS cited the ongoing activities in Montana to maintain and expand the West Slope Cutthroat as a primary reason to keep them off the endangered species list. Efforts are under way to restore Cutthroat in the Elkhorn Mountains. Currently only six miles of stream have pure Cutthroat, by the time the project is completed there will be over 70 miles of stream that contain Cutthroat.

The DFWP is working on a cooperative conservation agreement for the Yellowstone Cutthroat trout. Yellowstone Cutthroat do not have the range that the West Slope Cutthroat do. The historic range of the Yellowstone Cutthroat is from the headwaters of the Yellowstone River down to about Billings, and confined to the Yellowstone Basin. The same issues apply to them as to the West Slope Cutthroat, but it will be an easier program to manage because of the limited area that the fish are in. Yellowstone Cutthroat were petitioned for listing as an endangered species in 1998, but so far USFWS has not gotten around to listing them. The state is hopeful that the Yellowstone program can get going and preclude the USFWS from placing the fish on the endangered species list.

The state is currently working on a native species framework to encompass all fish native to the state. This plan will address fish management of native species in each watershed.

Legislative Proposals, Art Compton and Steve Welch DEQ

Art Compton briefed the committee in more detail on proposed changes to the Hardrock Mining Act in respect to hardrock bonding. One change increases the annual fees for permits, and would give DEQ the authority to seize abandoned reclamation bonds, including dormant exploration operations. Major bonding requirements will need a ten percent contingency to be posted in cash once the bond is calculated. This will give DEQ some liquid assets that will be immediately available to address any needs at a site where we are unable to get resources from the mining company or the surety bond holder. Another change requires any bonds to be deposited during the negotiation process rather than once the negotiations are concluded. The next change says that all forfeited bond proceeds be deposited to the state treasury in a designated interest bearing account for purposes of reclamation and all interest earned accrues to that same account. Currently any interest earned is paid into the general fund. The next item would clarify that a non-bankrupt forfeiture of a bond precludes the parent company or the officers of that

company from starting another company for purposes of mining. The last provision is for specific statutory language to allow the department to go after a parent company or a subsidiary, which forfeits a bond for not fulfilling their reclamation requirements.

Doug Parker asked what the status of the bill was and if there was one in print yet.

Mr. Compton did not know but would get a draft of the bill in the mail with the next minutes.

Chairman Parks asked if the ten percent cash contingency could be set up in such a way as to have the money accrue in your own account rather than the state being able to draw the interest. Mr. Compton thought that was a good point, it could really put a financial burden on a company to put that much money in an account and lose the interest at the same time.

Chairman Parks said the bonding authority should allow for contingency planning on the basis of everything working rather than reclamation failing. Mr. Compton agreed that contingency planning should address unforeseen conditions that may result in failure of the proposed water treatment and long-term water treatment needs.

Steve Welch didn't have a prepared briefing but said he would be glad to answer any questions from the committee about gravel operations and bonding.

Chairman Parks asked how satisfied is the department with adequacy of the bonding process for gravel operations getting reclaimed. Are there any new legislative proposals to address that issue? Mr. Welch said that there were no legislative proposals other than allowing the interest from the cash bond to build up. The department is confident that the bonds in place now are adequate.

Mr. Noble asked Mr. Welch to address a reference to bonding for perpetuity. Mr. Welch replied that there is no mechanism in the statute now that will allow for bonding for perpetuity. Once reclamation meets the standards that are in place now, that bond is released. Where there is a potential for some effect on ground water or surface water there would be a monitoring program in place that would detect anything. The potential does exist but there is nothing in the process now to address it. Bob Raisch said that the perpetuity issue arose at the last meeting and was for situations where water treatment is required for a long period of time.

Chairman Parks asked if all open cut gravel operations regardless of size are bonded. Mr. Welch said those operated by a public facility like the county or state highway department, are not bonded and small sites are not bonded. All others over a certain size are bonded. Those criteria are 10,000 yards removed per operator, and 10,000 yards of material removed from any gravel site.

Coal Bed Methane, Abe Horpestad, DEQ

There is a notice of a scoping meeting to be held in Wyoming by the Bureau of Land Management (BLM) for their Environmental Impact Statement (EIS) on coal bed methane development on federal land. Wyoming does not have the equivalent of a state Environmental Policy Act like Montana. The department plans to comment in writing on the Wyoming meeting.

In May the department took water samples in Squirrel Creek at several places. The water is salty, and contains ammonia, it is very high in Sodium Absorption Ratio (SAR), and the Total Dissolved Solids (TDS) doubles in that stretch. Squirrel Creek does this naturally from the headwaters to its mouth at the Tongue River, without any coal bed methane water input. The Montana BLM office is working on an Environmental Assessment (EA) for the Redstone Company's development. The department has applications for discharge permits and the department has written draft discharge permits but the permits have not been issued. The permits will be difficult to write without violating Montana's non-degradation regulations. The Northern Plains Resource Council (NPRC) issued a notice of intent to sue if the permits are issued without reopening for public comments. No decision has been made as to who will be the lead agency for the coal bed methane issue. Montana BLM is also working on an EIS for federal land. Wyoming BLM is working on a scoping agreement, and there seems to be no coordination between the two BLM offices.

Lewis Keim asked if this was going to become a political issue. Dr. Horpestad replied that is extremely likely. At the present time coal bed methane royalties and taxes provides over 15 percent of Wyoming's state budget. Both state and federal actions are on hold in Wyoming until the new EIS is completed. There is quite a bit of concern among the tribes over the whole process.

In response to a question, Dr. Horpestad replied that the Department has a position paper for public review that was handed out a couple of meetings ago. The Governor and his cabinet are considering a response.

Mr. Raisch said that the Governor supports the idea of a lead agency, and that DEQ or DNRC should be the lead, but no decision has been made. Once a decision on who will be lead is made things should get moving.

Dr. Horpestad said that the coal bed methane industry in Wyoming as well as Redstone Partners in Montana have approached the congressional delegation to get funding set aside for a single federal agency to do an EIS for both states. The federal agencies are gathering data now. Dr. Horpestad went on to explain that there is a considerable amount of data available from the coal boom mining days in 1970-1980 which could be used as baseline data.

Lawsuit Update Claudia Massman, DEQ

The only lawsuit that has had some activity is the Water Quality Standards lawsuit. The judge issued a final order the end of April, upholding EPA's position. This process started in 1998 when EPA was notified that they were in violation of the Clean Water Act. The state had to submit all its rules and statutes to EPA for review and explanation. In January, 1999 EPA approved most of Montana's standards but disapproved some statutory provision EPA considered to be "standards". During the 1999 legislative session Montana corrected all the unapproved standards. An amended complaint was filed challenging an exemption for non-point source non-degradation review and the mixing zone rules. The court upheld both rules. The plaintiffs then asked the court to have EPA go back and re-review every permit and TMDL that EPA had approved under the old standards. The court rejected that argument as well as several others. That decision has been appealed to the Tenth Circuit Court of appeals and it looks like the process will start all over again.

Bob Raisch asked for an update on the Endangered Species Act lawsuit. Ms. Massman said the consent decree between the plaintiffs and EPA was signed and filed with the court on May 30, 2000. Now any TMDL or list that we submit to EPA has to go through a section seven consultation.

Mr. Keim asked who has jurisdiction over permits that are appealed. Ms. Massman said the appellate court is the place to appeal a permit decision. Federal District Court does not have jurisdiction. The plaintiffs have appealed the decision, but the state does not know what the appeal will be based on.

Next Meeting

The next meeting will be August 17, 2000

Agenda Items

Lewis Keim asked staff to look into coal mining operations beginning again across the border in British Columbia that would effect the North Fork of the Flathead, and prepare a short review.

Doug Parker asked if it might be a good idea to postpone the meeting until after the legislative proposals are completed.

Chairman Parks said that water quality related legislative items that we haven't reviewed, would be an obvious agenda item.

Chairman Parks adjourned the meeting at 12:55 p.m.